LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 4 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 220.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN,

Appellant,

vs.

STANLEY J. BOWERS,
(Successor to John W. Peck),
Tax Commissioner of Ohio,

Appellee.

BRIEF OF APPELLANT.

ROBERT G. DAY,
HOPPE, DAY & FORD,
702 Second National Building,
Warren, Ohio,
Counsel for First Federal Savings and Loan Association of Warren.

TABLE OF CONTENTS.

References to Opinions Below 1

Statement of Grounds on Which Jurisdiction of Court Is Invoked 2

Constitutional Provisions and Statutes Involved 3

Questions Presented for Review 4

Statement of the Case 4

Summary of Argument 7

Argument 11

- Taxation by State of Federal Securities is Repugnant to the Constitution and Laws of the United States 11
- This Court Is Not Bound by the State Court's Determination of the Incidence of the Tax 15
- Analysis of State Statutes 22
- Incidence of the Tax is Upon Appellant and Its Property 24
- Analysis of Opinion of State Court 28
- The Statutes as Construed and Applied by the Supreme Court of Ohio Are Repugnant to the Constitution and Laws of the United States 37

Conclusion 41

Appendix. Constitutional and Statutory Provisions Involved 42

TABLE OF AUTHORITIES.

Cases.

Aberdeen Bank v. Chehalis County, 166 U. S. 440, 444 35

Bank of Commerce v. New York City, 2 Black 620, 629 (1862) 11, 13, 38

Banks v. The Mayor, 7 Wall. 16, 24 (1868) 11, 38

Bank Tax Case, 2 Wall. 200 (1864) 12, 33

Beard v. Peoples Savings Bank, 101 N. E. 325, 327 (1913) 26

Carpenter v. Shaw, 280 U. S. 363, 367, 50 S. Ct. 121, 123 18

Collett v. Springfield Savings Society, 13 O. C. C. 131, 143 25

Des Moines Nat. Bank v. Fairweather, 263 U. S. 103, 109 22-23, 34

Enterprise Irrigation District v. Canal Co., 243 U. S. 157, 164 15

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 42 S. Ct. 101 17

Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516 26

Home Savings Bank v. Des Moines, 205 U. S. 503, 515 13, 16, 26, 35

Lawrence v. State Tax Com., 286 U. S 276, 282, 52 S. Ct. 556, 558 16

McCulloch v. Maryland, 4 Wheat. 316 (1819) 11

Missouri v. Gehner, 281 U. S. 313 (1930) 13

National Bank v. Commonwealth, 76 U. S. (9 Wall.) 353 29

New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U. S. 665, 672-673, 70 S. Ct. 413, 417 ..... 13, 19, 28

Richfield Oil Corp v. State Board of Equalization, 329 U. S. 69, 83, 67 S. Ct. 156, 164 18

Rosch v. First Savings and Loan Association, 203 S. W. 2d 1006 14

Senior v. Braden, 295 U. S. 422, 429; 55 S. Ct. 800, 802 ..... 19, 40

Society for Savings in the City of Cleveland v. Peck, Tax Commissioner, 161 O. S. 122, 143, 55 O. O. 53, 118 N. E. 2d 651 1

Southern Gum Co. v. Laylin, 66 O. S. 578, 596 34

Stephenson & Potter v. Glander, 35 O. O. 368, 67 N. E. 2d 14 ..... 15, 19

St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362 17

United States, et al. v. Allegheny County, 332 U. S. 174, 184, 64 S. Ct. 908, 914 17

Van Allen v. Assessors, 70 U. S. (3 Wall.) 573, 583 30

Ward v. County Commissioners, 253 U. S. 17, 22 15

Weston v. Charleston, 2 Pet. 449 (1829) 11, 12, 13, 37

Yu Cong Eng v. Trinidad, 271 U. S. 500, 518-519, 46 S. Ct. 619, 623 16

Opinion.

1932 *O. A. G.* I, p. 558 20

Constitution.

Constitution of the United States:

Art. I, Sec. 8 ..... 2, 3, 4, 7, 11, 37, 42

Fourteenth Amendment 2, 3, 4, 39, 40, 42

Statutes.

United States Code:

Tit. 12, § 1433 ..... 2, 3, 4, 7, 14, 37, 42

Tit. 12, § 1464 *et seq.* 6

Tit. 28, § 1257(2), (3), 2101(c), 2103 2

Tit. 31, § 742 (R. S. § 3701) 2, 3, 4, 7, 14, 37, 42

General Code of Ohio:

§ 5324 ..... 3, 4, 6, 22, 23, 25, 29, 43

§ 5328-1 ..... 3, 43

§ 5406 ..... 3, 22, 44

§ 5407 ..... 3, 22, 39, 44

§ 5408 ..... 3, 22, 29, 30, 31, 32, 39, 45

§ 5409 ..... 3, 18, 22, 34, 45

§ 5410 ..... 3, 45

§ 5411 ..... 3, 23, 30, 46

§ 5411-1 ..... 3, 23, 30, 46

§ 5411-2 ..... 3, 30, 46

§ 5412 ..... 3, 23, 29, 30, 31, 32, 39, 47

§ 5412-1 ..... 3, 48

§ 5414-2 ..... 3, 48

§ 5414-8 *et seq.* 20

§ 5638 32

§ 5638-1 ..... 3, 23, 32, 49

§ 5673-1 ..... 3, 23, 49

§ 5673-2 ..... 3, 23, 50

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 220.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN,

Appellant,

vs.

STANLEY J. BOWERS,
(Successor to John W. Peck),
Tax Commissioner of Ohio,

Appellee.

BRIEF OF APPELLANT.

REFERENCES TO OPINIONS BELOW.

The per curiam and dissenting opinions in the Supreme Court of Ohio (R. 18, 21) are reported in 161 O. S. 149, 152, 53 O. O. 66 and 118 N. E. 2d 667. Only the first paragraph of the per curiam opinion relates to the issues before this Court; it refers to and adopts the reasons given in support of the judgment in the companion case of *Society for Savings in the City of Cleveland v. Peck, Tax Commissioner,* here on appeal in October Term, 1954, No. 204.* The majority and dissenting opinions in that case (No. 204, R. 30, 48) are reported in 161 O. S. 122, 143, 53 O. O. 53 and 118 N. E. 2d 651.

---

* References to pages of the printed Transcript of Record in that case will be indicated by the abbreviation "No. 204, R. ____."

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED.

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant case is conferred by Title 28, § 1257, (2), (3), 2101 (c), 2103. Probable jurisdiction on appeal was noted by order of the Court dated October 14, 1954 (R. 56).

The judgment of the Supreme Court of Ohio was entered March 10, 1954, Application for Rehearing denied March 31, 1954 (R. 30, 31) and the Order Allowing Appeal entered June 23, 1954 (R. 4, 30).

The statutes of Ohio providing for the assessment and collection of intangible taxes on personal property of financial institutions were construed and applied by the judgment of the Supreme Court of Ohio so as to tax Appellant upon account of its property representing surplus, or reserves and undivided profits for the years involved at the full book value thereof without deduction of the amount of United States Government bonds (including principal and interest) and stock in Federal Home Loan Bank (a Federal Government instrumentality) held by Appellant. The statutes of Ohio so construed and applied to Appellant invade the fiscal powers reserved to the Federal Government and are repugnant to the Constitution Article I, Section 8 and laws Tit. 31 U. S. C. § 742, Tit. 12 U. S. C. § 1433, of the United States. (*Infra* p. 42.)

The statutes of Ohio are repugnant to the Fourteenth Amendment to the Constitution for other reasons.

The majority opinion of the State Court construed the statutes as imposing a tax upon the depositors of the institution upon account of their ownership interests in the property representing surplus, or reserves and undivided profits and requiring the Appellant to pay such taxes without provision for reimbursement as distinguished from the

provision for tax upon the deposits themselves for reimbursement of which provision is made.

Since no provision for reimbursement of Appellant was made, it was thereby deprived of property without due process of law and denied the equal protection of the laws.

In similar taxation against unincorporated banks, the deduction of Federal securities from the tax base must be permitted; in comparison with that case Appellant is denied the equal protection of the laws.

Since the depositors had already been taxed upon the face value of the amount credited to their respective accounts (i.e. the amount withdrawable from their pass book accounts), such taxation of the depositors constitutes discriminatory double taxation and denial of the equal protection of the laws.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The case involves the Constitution of the United States, Article 1, Section 8 and Section 1 of the Fourteenth Amendment; United States Code Tit. 31 § 742 (R. S. § 3701) and Tit. 12, § 1433.

It also involves the statutes of Ohio relating to intangible personal property taxes on financial institutions on account of property representing capital employed by them measured in Appellant's case by reserves and undivided profits, particularly G. C. §§ 5324, 5328-1, 5406, 5407, 5408, 5409, 5410, 5411, 5411-1, 5411-2, 5412, 5412-1, 5414-2, 5638-1, 5673-1, and 5673-2.

All references are to the General Code applicable in this case—not to the Revised Code which has since become effective.

The pertinent text of the provisions cited is set forth in the Appendix, *infra* pp. 42-50.

QUESTIONS PRESENTED FOR REVIEW.

Whether the incidence of the intangible property tax imposed by the statutes of Ohio upon property of incorporated financial institutions having no capital stock or shares (other than withdrawable shares which are classed as deposits by the law, G. C. § 5324) measured by the book value of property representing surplus, or reserves and undivided profits, is upon the financial institution and its property or upon its depositors.

If the incidence of the tax is upon the institution—

(a) Whether the Statutes are not repugnant to the Constitution, Art. I, Sec. 8 and laws, U. S. Code Tit. 31 § 742 and Tit. 12, §1433, of the United States since deduction of the value of U. S. bonds and stock in Federal Government instrumentalities was denied.

(b) Whether the statutes so construed are not repugnant to the Fourteenth Amendment since they result in denial of the equal protection of the laws—the protection necessarily accorded to unincorporated banks permitting deduction of the value of Federal securities.

If the incidence of the tax is upon the depositors—

(a) Whether the statutes are not repugnant to the Fourteenth Amendment since the tax was paid by Appellant without provision for reimbursement thereby depriving Appellant of property without due process of law.

(b) Whether by discriminatory double taxation on the depositors with respect to the same property the statutes are not repugnant to the Fourteenth Amendment.

STATEMENT OF THE CASE.

This case is before the Court on appeal from a judgment of the Supreme Court of Ohio (R. 31) reversing an order (R. 6-17) of the Board of Tax Appeals (hereinafter called the "Board") of the State of Ohio, which reversed an order (R. 34) of the Tax Commissioner of Ohio (herein-

after called "Commissioner") and ordered allowance of an Application for Certificate of Abatement (R. 32) of intangible personal property taxes assessed against Appellant as a financial institution for the years 1947-1951 both inclusive.

This appeal involves the constitutionality and conflict with Federal statutes of statutes of Ohio construed by the Supreme Court of Ohio to permit taxation of property of Appellant representing its reserves and undivided profits without deduction of United States bonds and Federal Home Loan Bank stock owned by it.

Appellant has no stock other than withdrawable shares which are in fact and law savings deposits. The taxes were levied against Appellant measured by book value of its net assets including Federal securities owned by it, were paid by Appellant, and there is no provision for reimbursement therefor.

In each of the years involved, Appellant owned United States bonds and Federal Home Loan Bank stock, the book value of which exceeded the net book value of the property of the institution represented by its surplus, or reserves and undivided profits (R. 17).

In accordance with the statutory provision therefor application was filed with the Tax Commissioner of Ohio for abatement of taxes for the years 1947-1951 to allow for the deduction of Federal securities, and denied. Thereupon, appeal was taken to the Board which reversed the order of the Commissioner insofar as such order had denied the deduction of the amount of United States bonds and Federal Home Loan Bank stock from the amount of surplus or reserves and undivided profits, property of Appellant.

Appeal was taken by the Commissioner to the Supreme Court of Ohio which reversed the decision of the Board insofar as it was favorable to First Federal. Appli-

cation for rehearing was duly filed in the Supreme Court and denied (R. 21, 30).

The holdings of the Commissioner, Board and State Court with respect to the tax on deposits (as distinguished from the tax on property representing reserves and undivided profits) are not in issue herein.

No procedural questions are involved herein, all returns, claims for refund and abatement and notices of appeal having been duly and regularly filed and the taxes paid within the times required by law (Stipulation 9—R. 42).

Appellant is a Federal Savings and Loan Association incorporated and existing under the Home Owners Loan Act of 1933 as amended (Title 12 U. S. C. § 1464, *et seq.*) and having its place of business in Warren, Ohio. It is an incorporated financial institution located in Ohio, originally incorporated in 1922 as The Warren Savings and Loan Association and converted to a Federal Savings and Loan Association in 1936 (Stipulation 1—R. 37). Its members consist of all holders of savings accounts and all borrowers from Appellant (Exhibit 4, Art. 4 omitted in printing).

Appellant has never had or issued any permanent or non-withdrawable shares of stock. All of the accounts of its shareholders so-called are represented by savings account pass books (in which are entered all deposits, credits and withdrawals) and are deposits within the definition of G. C. § 5324. They are known as savings accounts (Reg. § 141.4—R. 38). The persons owning, holding in trust or having the beneficial interest in such accounts are entitled to withdraw any part or all of the amounts credited to their savings accounts and make deposits therein but are limited to such amounts and are not entitled to withdraw any part of the reserves or undivided profits of the taxpayer (Stipulations 2, 4; Regs. §§ 141.4, 141.6, 163.11—R. 37, 38, 39).

The taxpayer is by its charter (Appellant's Ex. 4—Art. 9) required to maintain general reserves and by regulations (Stip. 4, Regs. § 163.11—R. 39) is required to maintain a Federal insurance reserve account against which losses may be charged so that neither the Federal Savings and Loan Insurance Corporation or the depositors may be endangered by losses.

The forms of tax returns for financial institutions made no provision for deduction of bonds and stocks of the United States and federal instrumentalities and they were not deducted.

SUMMARY OF ARGUMENT.

The taxation of Federal securities (United States bonds and Federal Home Loan Bank stock) invades the fiscal powers reserved by Article I, Section 8 to the Federal government whose power in that field is supreme. This power is the foundation stone of the Federal credit.

Such taxation likewise violates the laws of the United States, 31 U. S. C. § 742 (R. S. 3701) and 12 U. S. C. § 1433.

The Supreme Court of Ohio attempted by its opinion to avoid the encroachment on Federal powers of the Statutes of Ohio, construed by it to permit taxation of Appellant's property without deduction of Federal securities by holding that the tax here in question on property representing capital, measured in this case by reserves and undivided profits, is actually a tax upon what it described as the ownership interests of the depositors in Appellant's property.

The majority opinion cited and quoted from cases differentiating between the property or interest of stockholder in an incorporated institution commonly called "shares," or the aggregate of such interests commonly

called "capital stock" on the one hand from the "capital" or "moneyed capital" or "property employed" with which the institution does business. It recognized that the State cannot levy a property tax against the corporation on its capital or on its net worth without excluding Federal securities in the computation of such capital or net worth; that the corporation is the legal owner of all of the property of the institution, real and personal, but went on in spite of such language to hold that the word "capital" or "property representing capital" in a financial institution used in the statutes did not mean the capital of the institution; but that the "capital employed in" or "by" the institution meant instead the capital stock or shares of the individual owners of the institution, which it said are the depositors since the institution has no permanent stock.

This Court is not bound by the State court's determination of the incidence of the tax. Its concern is with realities not nomenclature; with substance rather than form; in short, with the real nature, operation, practical effect and actual incidence of the tax.

The taxing statutes of Ohio provide in a single chapter a comprehensive plan for personal property taxation of financial institutions of various types, dealers in intangibles and domestic insurance companies with substantial uniformity of general effect. In the case of financial institutions each section covers such institutions of all types.

In the case of deposits which by the law of Ohio includes all savings accounts and so-called withdrawable shares, the tax is imposed upon the book value, the amount which may be withdrawn in each case. In the case of deposits in nonresident institutions, whether mutual savings banks, Federal or state savings and loan associations and others, the return is made and the tax assessed against

and paid by the individual depositor himself, and is based upon the book value of the account. In the case of resident institutions, the institution itself is required to make an overall return of deposits and to pay the tax but is given a lien upon the account and a right to recover it by charging the tax against the account.

In the case of incorporated institutions having permanent stock, the shares or capital stock are taxed at the value of the capital and surplus or reserves and undivided profits, but in the case of institutions whose capital stock is not divided into shares or all of whose shares are deposits, the tax is upon the property representing the capital employed, measured by the capital and surplus, or reserves and undivided profits.

Deposits are listed at their amounts as of a date in November fixed by the Board of Tax Appeals in each year whereas in the case of capital or property representing capital the listing is as of December 31 preceding the year in which the tax is assessed.

The taxes in issue here were levied against Appellant on the net book value of its property representing capital employed measured by its reserves and undivided profits. The taxes were paid by Appellant and there is no provision in law for reimbursement of Appellant therefor. The legal incidence of a tax accordingly, was on the Appellant and its property, not on its depositors. The tax on deposits was separately assessed and paid. The depositors are neither the legal nor beneficial owners of, and have no interest in, any part of its surplus or reserves and undivided profits. They may only withdraw the amounts credited on their pass book accounts. The reserves are for the sole purpose of meeting losses. Accordingly, the incidence of the tax cannot be upon the depositors. Again, there is no provision for reimbursement of the Appellant

or recoupment from its depositors for the taxes paid on account of its reserves and undivided profits. This is fatal to the proposition that the tax is against the depositors on account of their implied interest in reserves and undivided profits or property of the institution represented thereby.

If we are correct in our position that the incidence of the tax here involved is upon Appellant and its property, then clearly the statutes construed to permit such tax without deduction of Federal securities is repugnant to the Constitution and to the laws of the United States.

The statutes so construed not only invade the fiscal powers of the Federal government but result in deprivation of property without due process of law and in the denial of the equal protection of the laws by reason of the fact that in the case of unincorporated institutions the shareholders, partners or owners and the institution are identical and must be permitted to deduct Federal securities from the tax base.

Deprivation of property without due process and denial of equal protection result even if the incidence of the tax is on the depositors since (a) the Appellant was required to pay it without provision for reimbursement and (b) since the tax on depositors in nonresident institutions of the same sort and in institutions located anywhere having permanent stock will be limited to the face value of their accounts.

ARGUMENT.

Taxation by State of Federal Securities is Repugnant to the Constitution and Laws of the United States.

The taxation of bonds and stock of the United States and of Federal instrumentalities invades the fiscal powers reserved to the United States by Article I, Section 8 of the Constitution of the United States.

McCulloch v. Maryland, 4 Wheat. 316 (1819);
Weston v. Charleston, 2 Pet. 449 (1829);
Banks v. The Mayor, 7 Wall. 16, 24 (1868).

A statute of the State of New York, passed in 1857, enacted that the capital stock of banks of the State "should be assessed at its actual value and taxed in the same manner as other personal and real estate of the country." This was held unconstitutional since it did not exempt the value of stock of the United States held by the bank.

Bank of Commerce vs. New York City, 2 Black 620, 629 (1862):

> "1. Stock of the United States is not subject to taxation under the laws of a state.
>
> 2. A State law for that purpose is unconstitutional, whether it imposes the tax on United States stock *eo nomine*, or includes it in the aggregate of the taxpayer's property, to be valued, like the rest at its worth.
>
> 3. A tax on the nominal capital of a bank, without regard to the nature or value of the property composing it, is annexed to the franchise as a royalty for the grant, and not a burden imposed on the property itself.
>
> 4. But the law of New York taxes the capital of banks according to its valuation, and the property which constitutes it is subject to taxation or entitled to exemption therefor, like similar property held by individuals."

Referring to the case of *Weston v. Charleston, supra*, the Court said (p. 629):

> "It has been argued, however, that the form or mode of levying the tax under the ordinance of the City of Charleston was different from that of the law of New York, and hence may well distinguish the case and its principles from the present one. This difference consists in the circumstance that the tax in the former case was imposed on the stock, *eo nomine*, whereas in the present it is taxed in the aggregate of the taxpayer's property, and to be valued at its real worth in the same manner, as all other items of his taxable property. The stock is not taxed by name, and no discrimination is made in favor or against it, but is regarded like any other security for money or chose in action."

The New York statute was then amended to base the tax upon the amount of capital stock paid in or secured to be paid in and this in turn was held unconstitutional.

Bank Tax Case, 2 Wall. 200 (1864):

> "A tax laid by a State on banks, 'on a *valuation* equal to the amount of their capital stock paid in, or secured to be paid in,' is a tax on the property of the institution; and when the property consists of stocks of the Federal Government, the law laying the tax is void." (p. 200)

> "A statute of the state of New York, passed in 1857, making some modifications of previous acts of 1823, 1825 and 1830, enacted that the *capital stock of the banks of the State should be 'assessed at its actual value*, and taxed in the same manner as other personal and real estate of the country.'"

In that case the Court observed (pp. 208-209) that

> "When the capital * * * thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constitut-

> ing the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. * * * The legislature * * * when providing for a tax on * * * capital at a valuation * * * could not but have intended a tax upon the property in which the capital had been invested. * * * such is the practical effect of the tax * * *."

The last statement was quoted with approval in *New Jersey Realty Title Ins. Co. v. Div. of Tax Appeals*, 338 U. S. 665, 672-673, 70 S. Ct. 413, 417.

Referring to *Weston v. Charleston*, 2 Pet. 449, and *Bank of Commerce v. New York City*, 2 Black 620, this Court said in *Home Savings Bank v. Des Moines*, 205 U. S. 503, 515:

> "The case at bar cannot be distinguished in principle from these cases. In the first case the tax was on the capital stock at its actual value; in the second case on the amount of the capital stock and the surplus earnings, and in the case at bar on the shares of the stock, taking into account the capital, surplus and undivided earnings. It would be difficult for the most ingenious mind and the most accomplished pen to state any distinction between these three laws, except in the manner by which they all sought the same end—the taxation of the property of the bank. The slight concealment afforded by the omission of the property *eo nomine* is not sufficient to disguise the fact that in effect it is the property which is taxed. If included in that property it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of this court to see that the immunity is respected."

State of Missouri v. Gehner, 281 U. S. 313 (1930), 50 S. Ct. 326, involved a State tax on the net value of assets of insurance companies deducting Federal securities from

gross assets so as only partially to be reflected in net assets. The Court said (pp. 320-321)—

> "It is elementary that the bonds or other securities of the United States may not be taxed by state authority. That immunity always has been deemed an attribute of national supremacy and essential to its maintenance. The power of Congress to borrow money on the credit of the United States would be burdened and might be destroyed by state taxation of the means employed for that purpose. As the tax exempt feature tends to increase and is reflected in the market prices of such securities, a state tax burden thereon would adversely affect the terms upon which money may be borrowed to execute the purposes of the general government. It necessarily follows from the immunity created by federal authority that a State may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities. Neither ingenuity in calculation nor form of words in state enactments can deprive the owner of the tax exemption established for the benefit of the United States."

After the earlier decisions cited above the taxation of Federal bonds or stock of Federal instrumentalities has also been prohibited by Statute. Title 31 U. S. C. § 742 (R. S. § 3701), 12 U. S. C. § 1433.

Rosch v. First Savings and Loan Association, 203 S. W. 2d 1006—

> "Under statute requiring building and loan associations to render property to tax assessor for taxation including value of assets in excess of amounts over specified deductions, the word 'assets' means assets subject to taxation and not exempt and United States bonds, savings stamps and stocks held by Associations in Federal Home Loan Bank are deductible since they are tax exempt by law although not made deductible

specifically under the Statute. Vernon's Annotated Civil Statute Arts. 881a—53, 7162 § 37. Federal Home Loan Bank Act, § 13, 12 U. S. C. A. § 1433; 31 U. S. C. A. § 742."

The taxing statutes should be construed so as to preserve, if possible, the provisions thereof as enacted—*Stephenson & Potter v. Glander*, 35 O. O. 368, 67 N. E. 2d 14, discussed further, *infra*, p. 19.

This Court Is Not Bound by the State Court's Determination of the Incidence of the Tax.

The Court below recognized the principles stated under the caption above. However, the majority opinion (No. 204, R. 30, 34) first attempts to justify the judgment by the proposition that the tax on property representing capital (i.e. surplus, or reserves and undivided profits in the cases of Society for Savings and First Federal) is not a tax upon the institution but upon the ownership interests assumed to be vested in its depositors.

Although the Supreme Court of the United States will generally accept the construction of the state law by the highest court of the state, it will review such a decision where it is unfounded, untenable, without fair or substantial support, essentially arbitrary or a mere device to prevent review of the decision upon the Federal question —*Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157, 164 (Syl.):

"Where the non-federal ground is so certainly unfounded that it may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question, the judgment rests upon the latter and may be reviewed here."

Ward v. County Commissioners, 253 U. S. 17, 22;

Lawrence v. State Tax Com., 286 U. S. 276, 282, 52 S. Ct. 556, 558 (p. 558):

> "Even though the claimed constitutional protection be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the State court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."

A strained construction, not warranted by language of the statute cannot be sustained in order to make the law conform to a constitutional limitation—*Yu Cong Eng v. Trinidad*, 271 U. S. 500, 518-519; 46 S. Ct. 619, 623.

The Supreme Court is never bound by the state's characterization or determination of the incidence of the state tax or the form in which the taxing scheme is cast but will determine for itself the real nature, operation, substance and practical effect of the tax where the constitutionality of the tax is in question.

Home Savings Bank v. Des Moines, 205 U. S. 503, 510:

> "* * * The first step useful in the solution of this question is to ascertain with precision the nature of the tax in controversy, and upon what property it was levied, and that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the State. A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies.' But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in *New Orleans v. Houston*, 119 U. S. 265, 278, and *Home Insurance Co. v. New York*, 134 U. S. 594, with the view of de-

termining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself * * *."

United States, et al. v. Allegheny County, 332 U. S. 174, 184; 64 S. Ct. 908, 914. In that case this Court held that the incidence of a Pennsylvania tax, held by the state court to be a tax on land of Mesta Machine Company, was in substance a tax on machinery owned by the United States and void.

St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362 (p. 362):

"Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 42 S. Ct. 101 (p. 101):

"1. Courts—Writ of error lies to state decision that transaction was not interstate commerce.

"A decision by the highest court of a state sustaining a state statute imposing a tax on the gathering of oil by a pipe line company, where the oil was subsequently sent out of the state, is reviewable on writ of

error, though the court held the tax would be invalid if it burdened interstate commerce as defined by the court, but defined interstate commerce so as not to include those transactions, since it is the result reached by the state court, and not its method of reaching that result, which governs."

Carpenter v. Shaw, 280 U. S. 363, 367; 50 S. Ct. 121, 123 (p. 123):

"[6, 7] Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted. * * * We think it plain that the tax imposed on the royalty interest of the present petitioners is not a tax on oil and gas severed from the realty, but is, by its very terms, a tax upon the right reserved in them as lessors and owners of the fee. The tax is imposed on the 'royalty interest * * * except such interests of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States' and is made 'a lien on such interest.' It is in lieu of all other taxes 'upon any property rights attached to or inherent in the right' to the specified minerals and 'upon the mining rights and privileges for the minerals aforesaid belonging to or appertaining to the land."

The tax in the case at bar is in lieu of all other taxes on the other property [than real estate] and assets of the institution—G. C. § 5409 (*infra*, p. 45).

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 83, 67 S. Ct. 156, 164 (Syl. 7):

"Ruling of California Supreme Court that California Retail Sales Tax Act is an excise tax for privilege of conducting a retail business measured by gross receipts from sales and is not laid upon consumer and

does not become a tax on the sale or because of the sale, being a matter of state law, is binding on United States Supreme Court, but is not determinative of question whether the tax deprives a taxpayer of a federal right, which issue turns not on characterization which state has given the tax, but on its operation and effect. St. Cal. 1935, p. 1253, § 3; p. 1256, § 2; St. Cal. 1933, p. 2602; U. S. C. A. Const. art. 1, § 10, cl 2."

Senior v. Braden, 295 U. S. 422, 429; 55 S. Ct. 800, 802 (reversing 128 O. S. 597) discussed further, *infra* p. 40 (p. 429):

"The validity of the tax under the Federal Constitution is challenged. Accordingly, we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature."

N. J. Title Insurance Company v. Division of Tax Appeals, 338 U. S. 665, 673, 70 S. Ct. 413, 417, discussed *supra* p. 13, *infra* p. 28.

Stephenson & Potter vs. Glander, 67 N. E. 2d 14, 35 O. O. 368 (1946) is based upon similar statutory provisions contained in the chapter covering financial institutions. We quote from the syllabus—

"5. Taxation—The tax on dealers in intangibles as applied to an unincorporated dealer is on the employed capital of the dealer itself and ultimate incidence of tax is not on shares of stock as property of shareholders as in the case of incorporated dealer."

"6. Taxation—The state may not assess against a corporation or other like entity a tax which is essentially a property tax as distinguished from a franchise, privilege or excise tax, without allowing a deduction for sums invested in securities of the United States, regardless of whether the tax purports to be one laid directly upon the property or upon the capital of such entity."

"8. Taxation—Tax Commissioner had no authority to include as a part of taxable employed capital of unincorporated dealer in intangibles any part of valuation of United States bonds or other non-taxable securities owned by taxpayer by limiting deduction from employed capital to that portion of valuation of such non-taxable securities as was equal to the proportion between value of such non-taxable property and the value of all property of taxpayer. G. C. § 5414-1 et seq., § 5414-2."

Likewise the Attorney General of Ohio has ruled that a tax on domestic insurance companies under similar language in G. C. § 5414-8 et seq. may not validly be imposed upon the entire capital or surplus or net assets without deduction of bonds and stock of the federal government and its instrumentalities.—1932 *O. A. G.*, I, p. 558—

"1. In computing the capital and surplus of a domestic insurance company with capital, or the surplus of such a company without capital, for the purpose of taxation under the provisions of § 5414-8, et seq., of the General Code, so much of the assets as is invested in bonds or other securities of the United States, bonds issued by federal land banks and joint stock land banks, all bonds outstanding on the first day of January, 1913, of the State of Ohio or of any city, village, county or township in said state, or which have been issued in behalf of the public schools of Ohio, which bonds were outstanding on the first day of January, 1913 and all bonds of this state issued for the world war compensation fund must be deducted."

(p. [illegible] 1).

Although, as above noted, the tax on domestic insurance companies is not one laid directly on the property of such companies but is a tax on the capital and surplus of such companies having capital divided into shares, such tax is clearly a property tax as distin-

guished from a franchise or privilege tax or other form of excise taxes. In this view, it is to be noted with respect to the first question presented in your communication and other related questions therein stated, that the capital and surplus or the surplus, as the case may be, of a domestic insurance company can not be taxed insofar as the same is invested in property which the legislature could not legally tax. *New York vs. Tax etc., Commissioners*, 2 Black 260, 17 U. S. (L. Ed.) 451; *Bank Tax Case*, 2 Wall. 200, 17 U. S. (L. Ed.) 793. In Cooley on Taxation (Fourth Edition), Vol. 2, section 888, it is said:

> 'If a tax on capital or capital stock is deemed to be a property tax rather than an excise tax, then of course it cannot be imposed upon such stock so far as represented by property which the state could not lawfully tax, since what is forbidden directly cannot be accomplished indirectly; and such property cannot be indirectly reached by a tax on its capital without deducting the value of the nontaxable property. In other words, in valuing the capital stock, there must be a deduction of the amount represented by such nontaxable property. This includes not only property expressly exempted by the constitution, statute or charter, but also property impliedly exempt from state taxation because of a federal agency,—such as United States bonds or patents,—or because permanently located outside of the state so as not to be subject to the jurisdiction of the state to tax.'

"Giving effect to the rule above stated to the specific questions presented in your communication, it must be held that the legislature in the enactment of a property tax of this kind has no constitutional power and authority to levy a tax upon that part of the capital and surplus of a domestic insurance company which is invested in bonds or other securities of the United States. See also *State of Missouri, ex rel. Missiouri Insurance Company vs. Gehner*, 281 U. S. 313; *North-*

western Mutual Life Insurance Company vs. Wisconsin, 275 U. S. 136."

Analysis of State Statutes.

The taxing statutes of Ohio (*infra* pp. 43-50) provide in a single chapter a comprehensive plan for personal property taxation of financial institutions of various types of organization, dealers in intangibles and domestic insurance companies with substantial uniformity of general effect.

First Federal is a financial institution within the definition of G. C. § 5407.

G. C. § 5406 provides for the return by financial institutions annually of taxable deposits including withdrawable shares defined as deposits in G. C. § 5324 with certain exceptions which are not important to the case at bar.

G. C. § 5408 provides for the listing and assessment of (a) the shares of stockholders in an incorporated financial institution whose capital stock is divided into shares excepting such as are defined as deposits in G. C. § 5324; (b) the shares [i.e. interests] of stockholders [partners] in an unincorporated financial institution, the capital stock of which is divided into shares held by the owners of such institution; and (c) the capital employed or the property representing it, in a financial institution, the capital of which is not divided into shares or which has no capital stock [e.g. Society for Savings and First Federal].

G. C. § 5409 provides for the taxation of real estate of a financial institution as other real estate is taxed but that the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution. This is to be distinguished from some other statutes. Cf. *Des Moines Nat. Bank v. Fairweather*, 263

U. S. 103, 109, 44 S. Ct. 23, 25, in which the statute involved, superficially similar, provided for the assessment of real estate as other real estate but that the property of the corporation should not be otherwise assessed.

G. C. § 5411-1 provides for the fixing annually of a day in November as of which taxable deposits shall be listed.

Other assets are listed as of December 31st, preceding the return, under G. C. § 5411.

G. C. § 5412 provides for the assessment of (a) all the taxable shares of financial institutions; or (b) the value of the property representing the capital employed by such financial institution not divided into shares; in each case at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in the return and the amount of taxable deposits of such institution. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in § 5324 and are accordingly not returnable or taxable as shares, the last sentence of the section provides that such assessment of shares shall exclude the capital stock thereof but shall include the surplus or reserve and undivided profits so shown. The majority opinion (No. 204, R. 41) says that under the first sentence the amounts of withdrawable shares are assessed as deposits and that the last sentence provides for their assessment again as shares at the value of the surplus or reserves and undivided profits.

G. C. § 5638-1 provides for the levy of intangible property taxes (a) upon deposits at the rate of two mills on the dollar; and (b) upon shares in and capital employed by financial institutions at two mills on the dollar.

G. C. §§ 5673-1 and 5673-2 provide that a financial institution paying taxes upon its deposits and shares of

stock shall have a lien thereon for the reimbursement of the taxes so paid by it and may deduct such taxes from deposits, interests or dividends.

No provision is made anywhere for reimbursement of taxes upon capital or surplus and undivided profits in the case of an institution which has no shares other than such as are classed as deposits. (No. 204, R. 42, 49-50.)

Incidence of the Tax Is Upon Appellant and Its Property.

The taxes were levied against Appellant, measured by the book value of its property representing capital employed excluding capital stock (or deposits) but including its surplus, or reserves and undivided profits. They were paid by Appellant and there is no provision in law for reimbursement of Appellant therefor. The legal incidence of the tax was on Appellant and its property, not on its depositors.

Clearly the depositors of the taxpayer are neither legal nor beneficial owners of, and have no interest in, its surplus or reserves and undivided profits. The charter and regulations provide only for the withdrawal of the amounts credited on their pass book accounts and no more; and the reserves are for the sole purpose of meeting losses (Stipulations 2, 4; Regs. §§ 141.4, 141.6, 141.7, 163.11; R. 37, 38, 39).

Incidentally, although it is not in the record, the Federal Home Loan Bank Board has recently prescribed and the Taxpayer has adopted a new form of charter in which the obsolete term "shares" no longer appears but instead the words "savings accounts" are used. Obviously, in the case of institutions without permanent capital but having only deposits (or so-called withdrawable share or savings accounts which however labelled are defined in the law—

G. C. § 5324—as deposits) the assessment against depositors must be limited to the amounts which are withdrawable. These amounts vary from day to day as the depositors make additional deposits or withdrawals from their accounts and as shown in the record (Stip. 10, R. 42) numerically there is a complete turnover in the accounts on the average by closing of old accounts and opening of new accounts approximately every three years or about one-third of all accounts each year. The reserves are required by law and regulations; and while liquidation is possible, there is no occasion for liquidation and distribution thereof short of losses or business reverses sufficient to wipe out the reserves so as in the opinion of the examining officer no longer to justify the hazard to the public and the Federal Savings and Loan Insurance Corporation of continuing longer in business. In the meantime, such inchoate interest as any depositor might have had in reserves and undivided profits would be lost upon the withdrawal of his deposit or watered down to substantially nothing by increased deposits of others. Society for Savings has been in business for over 100 years and First Federal for 32 with no prospect in any depositor of realizing on any inchoate right in its reserves.

The definition of deposits (G. C. § 5324) includes only the amount which the person owning, holding in trust or having the beneficial interest therein is entitled to withdraw in money. As in *Collett v. Springfield Savings Society*, 13 O. C. C. 131, 143 (affirmed without opinion 56 O. S. 776), so here, the value of the depositor's interest can never rise above par. We quote (Syl. 3)—

> "3. The depositors are required to return and pay taxes upon the value of their interests in the society, and the society to return and pay taxes upon the remainder of the property not the reciprocal of such

interests. The surplus, undivided profits, real estate and furniture do not add to the taxable value of the depositors' interests, and a complete taxation of all the taxable property is effected by requiring the depositors to pay upon the value of their interests and the society to pay upon the surplus, undivided profits, real estate and furniture."

In a similar case an Indiana court held the surplus fund of a mutual savings bank taxable only to the bank—*Beard v. Peoples Savings Bank*, 101 N. E. 325, 327 (1913):

"* * * it does not belong to any particular depositor or class of depositors of the bank * * *. They have no interest in the surplus fund by which they can compel distribution either as a dividend or otherwise * * *. It is apparent we think that the surplus fund in a bank such as this cannot be taxed to the depositors and that if it is taxable at all it must be taxed to the bank."

Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516 (Syl.)—

"Where bonds are exempted from state taxation under the Federal Constitution they cannot be included as assets in ascertaining the surplus of the corporation owning them for the purpose of imposing a state property tax thereon."

(p. 528):

"It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

In *Home Savings Bank v. Des Moines*, 205 U. S. 505, 515, this Court held a tax imposed nominally on the capital stock of state and savings banks and loan and trust companies measured by capital, surplus and undivided earn-

ings, assessed against the bank and paid by it as in the case at bar, without provision for reimbursement was in substantial effect a tax on property of the bank and hence repugnant to the Constitution and laws of the United States. (Syl.)

"While the tax on an individual in respect to his shares in a corporation is not a tax on the corporation, and the value of the shares may be assessed without regard to the fact that the assets of the corporation include government securities, if the tax is actually on the corporation although nominally on the shares such securities may not be included in assessing the value of the shares for taxation.

"If a State has not the power to levy a tax it will not be sustained merely because another tax which it might lawfully impose would have the same ultimate incidence.

"The substantial effect of section 1332 of the Code of Iowa providing that shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and companies and not to the individual stockholders, and that in fixing the value of the shares capital, surplus and undivided earnings shall be taken into account, as the law has been construed by the highest court of the State, is to tax the property of the bank and not the shares of stock, and an assessment which includes government bonds owned by the bank in fixing the valuation of its shares is illegal and beyond the power of the State."

(p. 515):

"* * * The slight concealment afforded by the omission of the property eo nomine is not sufficient to disguise the fact that in effect it is the property which is taxed. If included in that property it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of the court to see that the immunity is respected."

(pp. 520-521):

"We regret that we are constrained to differ with the Supreme Court of the State on a question relating to its law. But, holding the opinion that the law directly taxes national securities, our duty is clear."

New Jersey Realty Title Ins. Co. v. Div. of Tax Appeals, 338 U. S. 665, 673; 70 S. Ct. 413, 417 involved a statute taxing stock insurance companies on the full value of their property (exclusive of real estate and tangible personal property separately taxed where located, shares of stock owned by such companies, and non-taxable and exempt property) deducting debts and liabilities and certain reserves; provided that the assessment should in no event be less than 15 per cent of the sum of paid-up capital and surplus in excess of all liabilities after deducting the amount of all tax assessments against real estate in the name of the Company.

This Court said—

"It matters not whether the tax is, as appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds. We can only conclude that the tax authorized by § 54: 4-22, whether levied against capital and surplus less liabilities or against entire net worth, is imposed on such securities regardless of the accounting label employed in describing it."

Analysis of Opinion of State Court.

The majority opinion erroneously construed the words "capital" and "the property representing it" in the Ohio statutes as meaning a part of the interest or claim of the

depositor in or against the institution rather than as describing the property and assets of the institution subject to its liabilities. We submit that the semantics of the majority opinion leads to one conclusion and then jumps to the other. The proper distinction is between the capital stock or shares of, or in, the institution on the one hand and the capital of, employed by, or in, the institution on the other. That distinction is clearly observed in the quotation by the State Court (No. 204, R. 34-35) from *National Bank v. Commonwealth*, 76 U. S. (9 Wall.), 353 and the other opinions from which the court quotes.

The same distinction is found in G. C. § 5408 which provides for the assessment of *shares of stockholders* in a financial institution the capital stock of which is divided into shares, in two different clauses depending on whether the institution is incorporated or unincorporated, and in another clause the *capital employed* or *the property representing it* in an institution the capital of which is not divided into shares or which has no capital stock. The terminology used with respect to the taxation of interests of the shareholders is "shares" or "capital stock," whereas the terminology used with reference to the interests and property of the institution is "capital" or "the property representing it." So in G. C. § 5412 provision is made for the assessment of the taxable shares of the institution in the case of those having capital stock divided into shares (other than deposits) and the value of the property representing the capital employed by the institution in case of an institution whose capital is not divided into shares; and in the case of an incorporated financial institution all of whose shares are deposits as defined in G. C. § 5324, institution is assessed on an amount excluding the capital stock thereof (i.e., the interest of the depositors) but including the surplus or reserve and undivided profits.

This last sentence of G. C. § 5412 does not refer to the case of "shareholders" in an incorporated financial institution of that sort but to the case of "an incorporated financial institution" itself. The deposits are taxed as of a date in November (G. C. § 5411-1, -2), and the capital measured by surplus or reserves and undivided profits (excluding the capital stock or interest of the depositors) are separately taxed as of the close of business on December 31st (G. C. § 5411) preceding the return.

The State court's quotation (No. 204, R. 36) from *Van Allen v. Assessors*, 70 U. S. (3 Wall.) 573, 583, does not support the definition of capital adopted by the State court in the cases at bar. The quotation begins,

> "* * * the tax on the *shares* is not a tax on the *capital* of the bank"

and proceeds in the next paragraph,

> "The interest of the shareholder entitles him to participate in the net profits of the bank in the employment of its *capital* during the existence of its charter, in proportion to the number of his *shares*." (Emphasis ours.)

We do not believe that "on a hasty reading" (No. 204, R. 38) or, *a fortiori*, on a careful reading, the words "capital employed, or the property representing it" found in G. C. § 5408 or the words "value of the property representing the capital employed by such financial institution, not divided into shares" found in G. C. § 5412 may reasonably be argued as describing the interest or claim of depositors in or against the institution. Those words are contrasted with the words "shares" and "capital stock" and, we submit, were used in the statutes with a fair degree of accuracy to express the intention of the legislators. The statutes indicate a rather comprehensive intention to tax

on a comparable basis various property interests in and of financial institutions under a number of varying circumstances. In the case of incorporated institutions having permanent capital stock or shares, a tax is imposed upon those shares, the property interest of the shareholders or stockholders. In the case of an unincorporated association having capital stock divided into shares, the tax is imposed likewise upon the shares but in such instance there is no corporate entity intervening, and the property of the institution is the property of the shareholders therein, regardless of whether it is defined as being held in shares or in fractional interests. The third situation is that of an institution having no shares, the mutuals like Society for Savings and First Federal which have no true shares, but only deposits.

We submit that the terms "capital," "the capital employed by" or "the capital employed in" a financial institution or "the property representing it" are used in the statutes in the case of institutions not having permanent capital stock to describe property owned by the institution, not property interests or claims of individuals in or against the institution. The argument (No. 204, R. 38-39) that the construction contended for by the taxpayers in these cases imputes to the General Assembly the excessive or wasteful use of words, defeats itself. Perhaps it is too much to attribute to the legislature perfection and the most economical use of words and an intent not to use any words which do not describe or apply to something already described or covered. If the minimum use of words were a requisite, G. C. § 5408 and § 5412 might well have been combined and still further condensed to read—

> "All the shares of stockholders in an incorporated financial institution located in this state having capital stock divided into shares, excepting such as are de-

> fined in § 5324 of the General Code as deposits, and the property representing capital, surplus, or reserves and undivided profits in financial institutions which are not incorporated or which have no capital stock other than deposits shall be listed and assessed at the book value thereof and taxed in the manner provided in this chapter."

saving far more than nine words. This is only by way of example. If the interpretation declared by the Court of the aim and meaning of the Legislature were correct, G. C. §§ 5408, 5412, 5638 and 5638-1 might well have been consolidated into a single section levying and assessing a tax of two mills on the dollar against the interests and claims of shareholders, partners, proprietors and depositors in and against the financial institution.

The word "capital" whether used in conjunction with the words "in," "of," "employed by" or "employed in" refers, we submit, to the property which the corporation employs or uses in the transaction of its business. It includes in the case of a financial institution, its office building, the cash on hand and on deposit with other institutions, notes, mortgages, bonds and other property and assets used in carrying on its business subject, of course, to its debts. The capital or property of the institution is generally distinguished from the interests of its shareholders and creditors by the use in describing the latter of the terms "capital stock" or "shares."

When the individual owners, shareholders, or depositors make payment to or deposit in a financial institution the capital or money paid in becomes the capital of the institution. In return, the individuals who paid in or deposited the money receive stock certificates or pass books and become stockholders or depositors. The capital formerly owned by them and paid into the institution is

thenceforth employed by the institution in conducting its business. Regardless of whether it is called the capital in or of the institution, or employed in or by it, the capital is that of the institution and is employed by it in its business. Furthermore, the majority opinion loses sight of the fact that since Society for Savings and First Federal have no outstanding capital stock or shares other than deposits, the capital taxed by these provisions or property representing it is limited to that measured by the reserves and undivided profits, which the depositors never paid in or owned and was never the capital of the depositors but which was accumulated from earnings of the institution.

In *Bank Tax Case*, 2 Wall. 200, 208-209, the court said—

> "* * * The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and, when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law."

We submit that it is reasonable to impute to the General Assembly an intent to provide for taxing the property of the institution in cases where that is necessary by reason of the form of the institution to equalize the taxation of shares in institutions having permanent stock. It is

only in the cases of the shares in incorporated institutions and deposits that a tax can possibly be assessed on any one other than the institution itself. In case of an unincorporated institution whether or not divided into shares the opinion is in error; no corporate entity intervenes and the property of the shareholders, proprietors or partners is the property of the institution itself whether it be described as shares, capital, capital employed, or property representing it, or aliquot interests therein. In an incorporated institution not having permanent shares or in an unincorporated institution, the taxable equivalent of permanent shares is the capital employed by it—the property of the institution.

Southern Gum Co. v. Laylin, 66 O. S. 578, 596, does not support the proposition for which it is cited (No. 204, R. 38) but rather the contrary. We quote—

> "It is urged, and truly, that the capital paid in by the stockholders becomes invested in property and that taxes are paid thereon the same as individuals pay upon their property."

The statute of Iowa involved in *Des Moines National Bank v. Fairweather*, 263 U. S. 103 (No. 204, R. 40) provided that except for real estate "the property of such corporation shall not be otherwise assessed." As distinguished from that, our G. C. § 5409 provides the tax provided for in this chapter shall be in lieu of all other taxes on the other property [than real estate] and assets of the institution, e.g., it is in lieu of other taxes on personal property of the institution. In cases where there are no permanent shares to tax and discrimination would result from the differences in organization, the chapter imposes a tax upon the property of the corporation, contrary to the statute involved in the *Fairweather* case.

The law involved in that case specifically assessed a tax on shares against the several shareholders not, as in the case at bar, against the financial institution itself. We quote (p. 105):

> "The facts may be shortly stated. No assessment was made against the bank, save of its real property."

The text of the law as quoted 263 U. S., 103 at p. 108 and 44 S. Ct. 23 at p. 25 reads:

> "Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this State, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. * * *"

The law went on to provide for payment of the tax in the first instance by the bank with ample provision for enforcing reimbursement from the shareholders.

The majority opinion (No. 204, R. 42-43) dismisses the want of any provision for reimbursement of Appellant by its depositors for the tax on its property representing reserves and undivided profits by saying that the payment will reduce the ultimate value of their property interests in the corporation and in effect reimburse it. The cases cited as holding that reimbursement is not necessary hold that the institution was acting as agent for its stockholders or depositors in paying the tax against them and in *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 444 there was specific provision for charging or collecting it out of their accounts. Where the institution pays the tax without provision for reimbursement, the incidence of the tax is on property of the institution.

The distinction was made clear in *Home Savings Bank v. Des Moines*, 205 U. S. 503, where a bank had been compelled to pay a tax on the value of its capital shares, with-

out deduction of the United States bonds owned; it was not given a right of reimbursement from the shareholders. The tax was held invalid.

(p. 511):

"* * * Nor can the corporations in the case at bar have by any possibility a common law right to recover the tax paid from the shareholders. The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt and not that of others, and there is nothing in such a payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks."

(p. 519):

"One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion."

* * * * *

(p. 520):

"Moreover, it may be said that, if given the effect claimed, the consideration that the ultimate burden of the tax is distributed upon the shareholders in proportion to their holdings, would have saved the taxes condemned in the Bank of Commerce case and the Bank Tax Case, and indeed all taxes assessed upon the property of corporations, and the immunity from

state tax of United States bonds owned by corporations would indirectly be absolutely destroyed."

The Statutes as Construed and Applied by the Supreme Court of Ohio are Repugnant to the Constitution and Laws of the United States.

If the incidence of the tax here involved is upon Appellant and its property as we contend, then the statutes construed to deny the deduction of Federal securities are repugnant to the Constitution, Article I, Section 8 and to U. S. Code, Tit. 31, § 742 and Tit. 12, § 1433, as shown in the first division of the Argument, *supra* pp. 11-15.

We quote further from some of the authorities—

Weston v. Charleston, 2 Pet. 449, 464:

"Congress has power 'to borrow money on the credit of the United States.' The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual * * *"

"If the states and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

"But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honour, the safety, the independence of the

nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigences, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, 'to borrow money on the credit of the United States.' Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every state and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power at their discretion?"

Bank of Commerce v. New York City, 2 Black 620, 633:

"The result of this doctrine is, that the exercise of any authority by a State Government trenching upon any of the powers granted to the General Government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of power. For, as truly said by the Chief Justice in the case of *Weston v. The City of Charleston*, in respect to the taxing power of the State, 'if the right to impose the tax exists, it is a right which, in its nature, acknowledges no limit, it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe."

Banks v. Mayor, 7 Wall. 16, 23:

"The authority to borrow money on the credit of the United States is, in the enumeration of the powers expressly granted by the Constitution, second in place,

> and only second in importance to the authority to lay and collect taxes. Both are given as means to the exercise of the functions of government under the Constitution; and both, if neither had been expressly conferred, would be necessarily implied from other powers—mentioning no others—to raise and support armies, to provide and maintain a navy, and to carry on war, could be exercised at all; or, if at all, with adequate efficiency."

The same statutory provisions for taxation apply to unincorporated banks as to savings and loan associations without permanent capital (G. C. §§ 5407, 5408, 5412); certainly no one could contend that the tax on capital of unincorporated banks is a tax on anything other than the assets in which it is invested. Their owners, whether called shareholders or partners, are the owners of the property without any intervening corporate entity. In arriving at the tax base of such banks the full value of Federal securities must be deducted. To apply a different rule to a federal savings and loan association would deny it the equal protection of the laws. The statutes so construed would be repugnant to the Fourteenth Amendment to the Constitution of the United States.

If the statutes were properly construed as imposing the tax on the depositors then the requirement that the institution pay the tax without reimbursement would deprive it of property without due process of law and would be repugnant to the Fourteenth Amendment.

The opinion presents an additional basis of unconstitutionality. As construed by the Ohio court, the statutes would impose upon the deposits in each institution two separate taxes, i.e. a tax of two mills on the dollar on the amount of the deposits and another tax of two mills on the dollar on the amount of the capital employed by the finan-

cial institution, i.e. upon the property representing its surplus, or reserves and undivided profits. This is double taxation—two personal property taxes assessed against the same property—and results in depriving the taxpayer of property without due process of law and denying it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States in *Senior v. Braden*, 295 U. S. 422, 55 S. Ct. 800 reversing the decision of the Ohio Supreme Court in 128 O. S. 597 held that the Ohio intangible personal property tax upon investments in land trust certificates representing interests in lands which were also subject to real estate taxes was double taxation contrary to the Fourteenth Amendment.

The depositors in Society for Savings and First Federal are no different from savings depositors in banks or savings and loan associations having permanent shares or capital stock—yet the former, under the Ohio decisions herein, would be taxed doubly whereas the depositors in institutions having permanent shares or capital stock would be taxed only upon the withdrawal value of their deposits and this despite the fact that in each case the depositors have the protection of the reserves and undivided profits behind them guarding against any loss. The situation of depositors in Society for Savings and First Federal is identical with that of residents of Ohio having deposits in mutual savings banks and federal savings and loan associations in other states except that in such instances the depositors are required to return such foreign deposits for taxation in their own names and at the face amount of their accounts, the withdrawal value only. This discrimination cannot be justified on the ground that there are two different kinds of property—the deposits on

the one hand and the reserves and undivided profits on the other, for their rights are inseparable. So long as the depositor maintains his deposit, he has the protection of the surplus, reserves and undivided profits; but he cannot withdraw his deposit without losing that protection; hence, if there were any ownership interest coupled with the deposit, the two would constitute only one item of property and not two separate items. No value is added by surplus, reserves and undivided profits and the additional tax on deposits would be confiscatory.

CONCLUSION.

In conclusion it is submitted that the judgment of the Supreme Court of Ohio is erroneous; that such judgment and the statutes of Ohio as construed and applied by it are repugnant to the Constitution and laws of the United States; and that the judgment should be reversed and the Order of the Board of Tax Appeals affirmed, or the cause remanded to the Supreme Court of Ohio for affirmance of such order.

Respectfully submitted,

ROBERT G. DAY,

Attorney for Appellant.

HOPPE, DAY & FORD,

Second National Building,

Warren, Ohio,

Of Counsel.

APPENDIX.

Constitutional and Statutory Provisions Involved.

Constitution—Article I, Section 8:

The Congress shall have Power * * *

"To borrow Money on the credit of the United States;"

Constitution—Fourteenth Amendment, Section 1:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code—Title 31, Section 742:

"*Exemption from taxation.* Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. (R. S. § 3701.)"

United States Code—Title 12, Section 1433:

"*Exception from taxation; obligation acceptable as credit on debt of home owner.*

"Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that in any real property of the bank shall be

subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any homeowner debtor of such bank. July 22, 1932, c. 522, § 13, 47 Stat. 735; May 28, 1935, c. 150, § 8, 49 Stat. 295."

General Code of Ohio:

§ 5324 " '*Deposits' defined.* The term 'deposits' as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, excepting (1) unearned premiums and surrender values under policies of insurance, and (2) such deposits in financial institutions outside of this state as yield annual income by way of interest or dividends in excess of four per centum of the principal sum so withdrawable." (114 O. L. 714, 716, Section 1)

§ 5328-1 "*Property to be entered on classified tax list and duplicate; exemption.*

"All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title * * *. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

"A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock." (120 O. L. 112, 113)

§ 5406 "*Deposits required to be returned by financial institutions; exceptions.*

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipality, corporation, school district, township, or other subdivision thereof, or to any other financial institution or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes, or proceeds of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in arriving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited." (124 O. L. 156, § 1)

§ 5407 "['Financial institution' defined.] The term 'financial institution' as used in this chapter includes every person who keeps an office or other place of business, in this state, and engages in the business of receiving deposits, and of lending money, buying or selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of in-

debtedness, with a view to profit. * * *" (114 O. L. 714, 747, § 3)

§ 5408 "[*Taxable property of financial institution, how listed, assessed and taxed.*] All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter." (115 O. L. 571, § 1)

§ 5409 "*Real Estate of financial institution, how and where taxed.*

The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution." (114 O. L. 714, 747, § 3)

§ 5410 "[*Record of names and residence of stockholders and shares of each; inspection.*]

"There shall be kept in the offices at all times where the business of such financial institution is transacted. a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which, at all times during business hours, shall be open to the inspection of all officers who are or may be authorized to list or assess such shares for taxation, or to administer the laws relating to such assessment." (114 O. L. 714, 748, § 3)

§ 5411 "*Annual report of resources and liabilities of banks and financial institutions.*

"The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager, or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding." (124 O. L. 449, 452, § 3)

§ 5411-1 "[*Day for listing and assessing taxable deposits fixed by commission; notice of action.*] On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day so fixed shall be between the first and thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby." (114 O. L. 714, 748, § 3)

§ 5411-2 "*Report of financial institution; contents.* The report of each financial institution made pursuant to section 5411 of the General Code shall also show the ag-

gregate balances of the taxable deposits of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received, then between the day so fixed and the first day of January next following, and the amount of the taxable deposits of each such depositor on the day so fixed." (122 O. L. 375, § 1)

§ 5412 *"Tax commissioner to ascertain and assess all taxable shares and capital of financial institution; depositors to be assessed, when.*

"Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown." (122 O. L. 375, 376, § 1)

§ 5412-1 *"Certification of assessment of financial institution to auditor of state; certification of assessment of depositors to county auditors; amounts placed on tax lists; certificate of abatement.*

"On or before the first Monday of May, annually, the tax commissioner shall certify to the auditor of state the assessment of each financial institution located in the state, showing separately the county in which the institution's principal office is located, and the amount or amounts of taxable deposits, if any, of branches in each county other than that in which such principal office is located, and to each county auditor the assessment of each taxable deposit separately assessed in the name of a depositor residing in his county. The auditor of state shall place the amount or amounts so certified on the intangible property tax list in his office. The county auditor shall place the amounts so certified on the classified tax list and duplicate of his county in the names of the depositors represented by such certificates.

"Any certificate of abatement issued pursuant to section 1464-3 of the General Code for the overpayment of the deposits tax or taxes imposed on shares of financial institutions or on capital employed by financial institutions may be tendered by the payee or transferee thereof to the treasurer of state as payment for any taxes allocable to the county in which the claim for overpayment arose." (124 O. L. 64, 66)

§ 5414-2 *"Taxable property of dealer in intangibles, how listed, assessed and taxed.*

All the shares of the stockholders in an incorporated dealer in intangibles having an actual place of business in this state, to the extent represented by capital employed in this state, all the shares of the stockholders, partners or members of an unincorporated dealer in intangibles, having an actual place of business in this state, the capital stock of which is divided into shares held by the owners thereof,

to the extent represented by capital employed in this state, or the property representing capital employed in the state by an unincorporated dealer in intangibles whose capital stock is not divided into shares, having an actual place of business in this state, shall be listed and assessed at the fair value thereof and taxed only in the manner prescribed in this chapter."

§ 5638-1 *"Tax levy on property on intangible property tax list; rates.* Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to-wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; * * *." (120 O. L. 115, 117, § 1)

§ 5673-1 "[*Taxes a lien on deposits and shares of stock of financial institution; payment.*]

"Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hundred dollars for every day of delay in the payment of such taxes." (115 O. L. 595, § 1)

§ 5673-2 *"Financial institution may deduct taxes from deposits, interests or dividends, how and when; lien; enforcement of lien.*

"A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and/or upon its withdrawable shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer." (115 O. L. 595, § 1)